

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION  
CASE NO. 23-cr-80101-AMC

UNITED STATES OF AMERICA, Fort Pierce, Florida  
Plaintiff, June 24, 2024

vs.

10:03 a.m. - 11:42 a.m.

DONALD J. TRUMP, WALTINE NAUTA, CARLOS  
DE OLIVEIRA,

Defendant. Pages 1 to 90

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TRANSCRIPT OF MOTIONS  
BEFORE THE HONORABLE AILEEN M. CANNON  
UNITED STATES DISTRICT JUDGE

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FOR THE GOVERNMENT:

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16 LAURA E. MELTON, RMR, CRR, FPR  
17 Official Court Reporter to the  
18 Honorable Aileen M. Cannon  
United States District Court  
19 Fort Pierce, Florida

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1 (Call to the order of the Court.)

2 THE COURT: Good morning. You may all be seated.

3 Please call the case.

4 COURTROOM DEPUTY: United States of

5 America v. Donald J. Trump, Waltine Nauta, and

6 Carlos De Oliveira. Case Number 23-cr-80101.

7 Will parties please state your appearance, starting  
8 with Special Counsel.

9 MR. BRATT: Good morning, Your Honor. Jay Bratt and  
10 James Pearce on behalf of the United States.

11 THE COURT: Good morning.

12 MR. BOVE: Good morning, Your Honor. Emil Bove,  
13 Todd Blanche, Kendra Wharton, and Lazaro Fields, here for  
14 President Trump, who is not here this morning with leave of the  
15 Court.

16 THE COURT: Good morning to all of you.

17 MR. WOODWARD: Good morning, Your Honor.  
18 Stanley Woodward and Sasha Dadan, on behalf of Mr. Nauta, who  
19 also is not present, with leave of the Court. And then, my law  
20 clerk, Ashleigh Bondoc, is here with us as well.

21 THE COURT: Good morning.

22 MR. IRVING: Good morning, Your Honor. John Irving and  
23 Donnie Murrell on behalf of Mr. De Oliveira, who is also not  
24 here.

25 THE COURT: All right. Good morning to everybody.

1 I hope everybody had a good weekend. We are set this  
2 morning to hear argument on the second half of the motion  
3 discussed on Friday. This is styled as President Trump's  
4 motion to dismiss the indictment, based on unlawful funding of  
5 Special Counsel Jack Smith. There is an opposition and reply,  
6 along with some supplemental briefs with respect to a recent  
7 Supreme Court decision on the Appropriations Clause. I have  
8 reviewed all of those materials and I'm prepared to hear  
9 argument.

10 I do want to note we have, as usual, our live feed  
11 setup to the second-floor overflow room, for any additional  
12 folks wishing to view this proceeding.

13 And so with that, Mr. Bove, are you going to be arguing  
14 this morning?

15 MR. BOVE: Yes, Your Honor.

16 THE COURT: All right. Let me hear from you then, from  
17 the lectern.

18 MR. BOVE: Thank you, Judge.

19 In this case, the Special Counsel's Office from its  
20 inception, should not have been accessing the -- the permanent  
21 and definite appropriation, and they should not be able to  
22 access it going forward. In this criminal case, in this  
23 setting, the Appropriations Clause operates as an important  
24 restraint on the executive branch and their ability to make  
25 cases like this.

1           Big picture, and I think some of this draws on some of  
2     the things that we talked about on Friday, there are two main  
3     flaws in the government's opposition to this motion. One is  
4     that they're persisting in strained interpretations -- and I  
5     think interpretations is generous -- of statutory text; and  
6     second, there is irreconcilable tension between the position  
7     with respect to the Appointments Clause and the independence of  
8     Jack Smith. Textually with this appropriation, there is really  
9     two terms I would like to cover this morning; one is the term  
10    "other law," and the other is the term "independent counsel."

11           "Other law," I think, we spent a lot of time on on  
12    Friday, Judge, because we're in -- are almost exclusively  
13    talking about the same series of statutes that was at issue in  
14    the Appointments Clause motion, 515, 533, and the interplay  
15    between those statutes and, for example, 543 and 519.

16           THE COURT: So would you argue that -- would you agree  
17    that the arguments travel together in terms of the other law  
18    inquiry?

19           MR. BOVE: Yes, Judge. And I think what is important  
20    here with respect to this piece of the -- the appropriation  
21    that we're talking about, the text of the statute that we're  
22    looking at, is that it requires a present, current analysis of  
23    whether or not there is a valid appointment pursuant to, quote,  
24    "other law." And so I will just incorporate the arguments that  
25    we made in our briefing, and on Friday, with respect to the

1 relevant provisions of Title 28.

2 THE COURT: Before you jump into the merits, there is a  
3 suggestion in the opposition and, I think, reasserted in the  
4 supplemental brief by the Special Counsel, that you lack  
5 standing to pursue this challenge. Can you address that issue?

6 MR. BOVE: Yes, Judge. I think that the one core that  
7 is addressed -- the closest version of this argument to the one  
8 that we're making, Stone -- looked at the standing question and  
9 looked at it relative to whether injunctive relief was  
10 available, and said that the appropriate means for vindicating  
11 the types of concerns that we have on behalf of a criminal  
12 defendant is a Rule 12(b) motion.

13 So I think the Stone case supports our -- the fact that  
14 we have standing and the ability to bring a motion to dismiss  
15 here on this basis. And that the McIntosh case from the Ninth  
16 Circuit certainly supports that. And I think, in both cases,  
17 they track through some other decisions, where -- I -- I --  
18 look, I think there was a strategic decision in Stone to pursue  
19 both injunctive relief -- to pursue both injunctive relief and  
20 dismissal. We looked at the analysis and the -- the Younger  
21 abstention analysis in Stone and decided that dismissal is the  
22 appropriate avenue, but I think it's clear from Stone and  
23 McIntosh that we can proceed this way.

24 THE COURT: So what is the -- what is the cognizable  
25 injury that you're suffering that is fairly traceable to the

1 appropriation?

2 MR. BOVE: It is the imminent threat of the liberty  
3 restraint on President Trump that would result from a  
4 conviction in this case. And I think that McIntosh looks at it  
5 exactly that way because there are defendants in that case who  
6 had not been convicted yet, who were pursuing the appeal as  
7 a mandamus petition. And the analysis of the Ninth Circuit in  
8 McIntosh was basically -- there is a liberty interest at issue  
9 here, and it's -- the threat of losing it is imminent in the  
10 context of an ongoing criminal prosecution.

11 And so I -- my two best cases there are McIntosh and  
12 Stone, and I think they squarely support what we're doing here.  
13 And the cases -- especially the D.C. Circuit cases that the  
14 Stone court walked through, although not criminal cases, the  
15 abstention doctrine analysis there supports this manner of  
16 proceeding as well.

17 THE COURT: Another preliminary question is: There is  
18 also a suggestion that you're not actually raising a challenge  
19 under the Appropriations Clause, because you're not challenging  
20 the underlying constitutionality of the Appropriations Act in  
21 1987 and, perhaps, for other reasons. Can you address whether  
22 you are, in fact, bringing a challenge under the Appropriations  
23 Clause and why you are, if that is the case?

24 MR. BOVE: Yes, Judge. We are -- this motion is  
25 pursuant to the Appropriations Clause. Some of our arguments

1     which we'll get into rely on the text of the appropriation  
2     itself. But ultimately, the Appropriations Clause functions in  
3     two ways. There is a Congressional obligation to make  
4     appropriations where necessary, but there is also a restriction  
5     on the executive to only act in a way where there is a valid  
6     appropriation. And I think that, as a general proposition,  
7     this concept that the Appropriations Clause operates  
8     as a -- on -- as a -- as relevant to both branches is made  
9     pretty clear in one of the cases that the Special Counsel's  
10    Office cites in their brief, OPM v. Richmond. This is the  
11    Supreme Court at 496 U.S. 414.

12                 "Any exercise of a power granted by the Constitution to  
13    one of the other branches of government is limited by a valid  
14    reservation of Congressional control over funds in the  
15    Treasury."

16                 And so our argument here, under that type -- that type  
17    of analysis and the separation of powers concerns that it  
18    implicates, is that there is not a valid appropriation that  
19    authorizes what's going on here. So that is very much a  
20    constitutional argument based on the Appropriations Clause with  
21    the separation of powers implications that I have referenced  
22    grounded in the text of the appropriation itself which does not  
23    apply here.

24                 THE COURT: Okay. So just so I understand it, your  
25    argument is that the payment of money has to be authorized by



1 statute, and it's not authorized in this case, and, therefore,  
2 it implicates the Appropriations Clause?

3 MR. BOVE: Correct, yes.

4 THE COURT: Okay. All right. Okay. Now, in terms of  
5 the actual Appropriations Act, what we're dealing with -- and I  
6 just want to hone in on the specific statutory language. Where  
7 does it start and where does it end? There is a "provided  
8 further" with a quotation to 28 U.S.C. 591 note, and then there  
9 is some other references to what appear to be irrelevant  
10 material such as Interpol. So I just want to make sure we're  
11 talking about the same statutory appropriation.

12 MR. BOVE: Yes, Judge. So I -- our motion is focused  
13 on Public Law 100-202. The main text of the motion -- the main  
14 text that the motion is based on is the language that  
15 begins -- begins: "Provided further, 28 U.S.C. 591 note" --  
16 and ends with "other law."

17 There is some context in that paragraph that I think is  
18 relevant to the Court's consideration of what Congress meant  
19 when it chose those terms.

20 THE COURT: Does it include the next sentence:  
21 "Provided further, that the comptroller general shall perform  
22 semi-annual financial reviews of expenditures from the  
23 independent counsel, permanent indefinite appropriation, and  
24 report their findings to the committees on appropriations of  
25 the House and Senate"?

1 MR. BOVE: That language is in the 1987 Public Law, but  
2 when it was struck by Congress in 2009, pursuant to Public Law  
3 111-68 -- and I was hoping to touch on that at some point this  
4 morning. And I will just do it, I think, relatively quickly  
5 here because there is, I think, some suggestion that Congress  
6 having -- some suggestion that that Public Law in 2009  
7 indicates that Congress revisited the appropriation and was  
8 comfortable with the state of affairs, and so there is no need  
9 for Your Honor -- I don't think that is right at all.

10 If Your Honor looks at Public Law 111-68, and this is  
11 in Section 1501, what's really going on there is Congress went  
12 through and struck a series of five audit requirements that GAO  
13 was subject to. And the title of that section is: "Repeal of  
14 Certain Audits, Studies, and Reviews of the Government  
15 Accountability Office."

16 And so I -- you know, we got here in response to the  
17 question of: Is that GAO language still a part of the  
18 appropriation? It's not. And I'm just -- what I'm endeavoring  
19 to do is to clarify that I think that the relevance of that  
20 decision by Congress to strike that language is only that,  
21 since 2009, the GAO has not been tasked with taking any kind of  
22 look at what is going on with the -- the appropriations  
23 language that precedes it.

24 THE COURT: So the two GAO reports, I think, that have  
25 been issued, one with respect to Mr. Durham and one,

1 Mr. Fitzgerald, were those evaluating pre- or post-2009?

2 MR. BOVE: So I'm familiar with some analysis of the  
3 Danforth appointment. Pursuant to this language, the GAO has  
4 an independent obligation to look at and review expenditures  
5 and conduct financial audits like this. It's cited -- it's a  
6 provision of Title 31 that is cited in the Fitzgerald GAO  
7 opinion.

8 And so the two opinions -- there is this argument about  
9 the GAO looked at some of the Danforth expenditures immediately  
10 after the Reno Regulations. Our position on that is that there  
11 was nobody here with the types of interests that President  
12 Trump has in this case to make the arguments that we're making.  
13 And so that -- that review was -- was really just based  
14 on -- was focused on the financial aspects of what was being  
15 spent in connection with the Danforth investigation, which I  
16 don't think led to criminal prosecutions and never created the  
17 type of situation that we have here.

18 And then the analysis of the Fitzgerald appointment,  
19 from what we submit, strongly supports our position here,  
20 because that was a situation where 515(b) arguably applied  
21 because Patrick Fitzgerald was a U.S. attorney who had been  
22 appointed into this -- into that position. And so there was a  
23 very different analysis on the statutory questions that we  
24 talked about on Friday.

25 And in addition to that, in that case -- I think that

1 it was James Comey as acting -- struck -- or said  
2 Mr. Fitzgerald is not subject to the Reno Regulations, which  
3 are the relevant restriction on the independence of Jack Smith  
4 that is, I think, a powerful part of our motion.

5 THE COURT: Okay. So, now, that we've isolated the  
6 particular statute, my question is: Is there any cap to the  
7 funding?

8 MR. BOVE: No. And I think that's part of the reason,  
9 from a separation of powers perspective, to be very wary of  
10 how -- who can access this and why, and especially in the  
11 context of a criminal defendant with important rights in a  
12 proceeding like this, for the Court to take a hard look, a look  
13 that, we submit, has not been taken, based on some of the  
14 arguments we've made, in any other case.

15 THE COURT: Are you familiar with any authority on the  
16 constitutionality of fully unbounded appropriations?

17 MR. BOVE: I -- we -- especially following the CFPB  
18 decision, which, I think, gives a -- "no" is the short answer,  
19 that we're not making an argument that the --

20 THE COURT: In CFPB, was there some degree of a cap --

21 MR. BOVE: Yes.

22 THE COURT: -- for a percentage?

23 MR. BOVE: Yes.

24 THE COURT: Does that play at all into your argument?

25 MR. BOVE: We -- it does in the sense that

1 it -- it's -- it highlights the separation of powers problem  
2 that the Special Counsel's Office is able to access an  
3 indefinite, infinite budget to fund at least, you know, at this  
4 point, two prosecutions in different districts. And it's  
5 exactly the types of concerns that were raised in the hearings  
6 that preceded the Reno Regulations, that there's no check on  
7 the scope of what's going on here.

8 And so it's relevant -- the lack of a cap is relevant  
9 to the separation of powers point that we're making.

10 THE COURT: All right. Okay. You can resume your  
11 argument.

12 MR. BOVE: So with other -- the phrase "other law" --  
13 as I said, we are just going to incorporate our statutory  
14 arguments. But there's one piece here that the government is  
15 making an argument that's a little bit different than some of  
16 the things that we talked about on Friday. And the argument is  
17 that the Reno Regulations can serve as, quote, "other law" for  
18 purposes of this appropriation. And I just want to talk a  
19 little bit about that, because that's just not right.

20 On Friday, the government's argument at the Reno  
21 Regulations, I think, was that they can be rescinded at any  
22 time, and that's one of the reasons that the Attorney General  
23 has a check on the autonomy and the authority of Jack Smith.  
24 But that very same feature of these regulations mean that they  
25 are not, quote, "other law" for purposes of this appropriation.

1 And this is really an Administrative Procedures Act issue, and  
2 it goes to the difference between a substantive regulation and  
3 a regulation that is intended to serve as not a substantive  
4 rule, which is the language in the Federal Register relating to  
5 the Reno Regulations.

6 And if Your Honor looks at Chrysler v. Brown, this is a  
7 Supreme Court case from 1979, the cite is 441 U.S. 281. That's  
8 a case that talks about this distinction and goes to great  
9 length to address the issue of what types of regulations have  
10 the force of law, a phrase that I'm mindful the Nixon court  
11 used with respect to the Watergate regulations. Those  
12 regulations did not have this language about, "This is not a  
13 substantive rule."

14 And so because of that carveout, that Attorney General  
15 Reno placed on the current regulations that are at issue, these  
16 regulations cannot be other law for purposes of the  
17 appropriation under Chrysler. And there is similar language in  
18 a case called Perez by the Supreme Court at 575 U.S. 92.

19 And so that's just, sort of, a technical point that I  
20 wanted to make, that I think that that's a foreclosed argument.  
21 That the government, to establish the appropriateness of  
22 accessing this appropriation, based on other law, has to look  
23 to these Title 28 statutes. For the reasons we discussed on  
24 Friday, we submit that they cannot do that.

25 THE COURT: In the GAO report, was there some

1 discussion of the regulations and some characterization of the  
2 regulations as not substantive? I'm summarizing, but I believe  
3 there was some comment on the regulations in the direction that  
4 you're speaking.

5 MR. BOVE: I -- so I don't think that the -- at least  
6 the GAO was not focused on this argument directly, but there is  
7 a footnote in the GAO report, Footnote 4, that makes an  
8 important distinction between the old part 600 regulations, the  
9 regulations that preceded the Reno Regulations, and the current  
10 ones. And the distinction being -- the way that the GAO framed  
11 it was, they're looking at the D.C. circuit's analysis, and the  
12 D.C. circuit is saying basically, well, the Iran-Contra  
13 regulations, which included the promulgation of the old part of  
14 600 --

15 THE COURT: Uh-huh.

16 MR. BOVE: -- those basically mirror the Ethics in  
17 Government Act. We don't see any support for the proposition  
18 that the Reno Regulations do the same thing. The GAO is, of  
19 course, exactly right. The Reno Regulations, in most respects,  
20 do the opposite.

21 THE COURT: When you say "do the opposite," you mean  
22 what?

23 MR. BOVE: They are restrictions on the independence of  
24 any Special Counsel appointed pursuant to that authority that  
25 did not exist at all in the Ethics in Government Act and in the

1 prior version of part 600 that was at issue in the Iran-Contra  
2 regulations, in the Nofziger regulations, and in the savings  
3 and loan regulations.

4 Because that -- that old 600, which mirrored the Ethics  
5 in Government Act, granted the -- the regulatory Special  
6 Counsel sort of appointed pursuant to those regs when the EGA  
7 had lapsed. It was giving them authority that mirrored, almost  
8 identically, the independent counsel from the Ethics in  
9 Government Act.

10 THE COURT: Okay.

11 All right. Okay. Anything further with -- with  
12 respect to the "other law"?

13 MR. BOVE: No, Judge.

14 THE COURT: What cases exist on the subject of  
15 potential remedies in the area of Appropriations Clause  
16 matters?

17 MR. BOVE: We are -- we are focused in the same -- I  
18 think this is why it came up in the context of standing. A few  
19 minutes ago, we were focused on McIntosh, the 9th Circuit, and  
20 Stone, which obviously came out against us in the District of  
21 Columbia.

22 I think --

23 THE COURT: Well, you're seeking dismissal here, but I  
24 don't understand your motion to be seeking any sort of  
25 injunction on continued spending. Is that correct?



1 MR. BOVE: That's correct.

2 THE COURT: Okay. So you're seeking one remedy less  
3 than what was sought in McIntosh; correct?

4 MR. BOVE: Well, I think that what happened in McIntosh  
5 is that, at the end of the opinion, the 9th Circuit says: We  
6 defer to the district courts on the issue of remedy, but this  
7 appropriations language under Appropriations Clause analysis  
8 restricts the ability of DOJ to spend money on continued  
9 prosecutions.

10 And so DOJ and the district courts will have to make a  
11 decision about -- in that case, there was an evidentiary -- a  
12 fact question about whether compliance with state law warranted  
13 access to the appropriation that was at issue. And if that  
14 fact question was answered in favor of the defendants, what is  
15 going to happen next?

16 And we took a look at what happened next, because there  
17 is ten cases consolidated in McIntosh and one of them, docketed  
18 in the Eastern District of California at 13-cr-294, led to the  
19 government dismissing the charges against three defendants  
20 pursuant to Rule 48. And if you look at that filing, which is  
21 at ECF Number 170 on that ED CAL docket, what you see is the  
22 government saying: We can't meet our evidentiary burden. We  
23 can't establish that we should have access to this  
24 appropriation and, therefore, we acknowledge that we can't  
25 proceed with the case."

1           And so our position is that the McIntosh 9th Circuit  
2     analysis foreshadowed that type of outcome, and that that's  
3     ultimately what happened when the government recognized that it  
4     should not be accessing the appropriation in -- after the  
5     courts interpreted the way it applied.

6           THE COURT: Okay. Are you -- I think there is some  
7     discussion in your brief about comparing the degree of  
8     independence of the -- the independent counsel under the  
9     Independent Counsel Act versus the degree of independence under  
10    the current regulatory framework.

11           Are you still persisting in that position, that there's  
12    a mismatch in the degree of independence?

13           MR. BOVE: Yes. There's a mismatch and, as I said, an  
14    irreconcilable difference between the government's position on  
15    independence under the Appointments Clause the Appropriations  
16    Clause. They have to say, on Friday, that they are not  
17    independent; and today, they have to say that they are  
18    independent to be able access this appropriation.

19           And our position is that both cannot be true. And I'd  
20    would like to, if I could --

21           THE COURT: So setting that potential tension aside for  
22    a moment, what, in fact, though, is the comparison? If you  
23    were to do a side-by-side of the Special Counsel regulations  
24    versus the Independent Counsel Act, what do you say is more or  
25    less restrictive in the current posture?

1           MR. BOVE: So a few things, Judge. The -- start out  
2 with the -- who's appointing the special prosecutor?  
3 In -- under the EGA, it is the Special Division in the District  
4 of Columbia ultimately making the appointment. And in at least  
5 one example, when it was time -- when -- when the EGA was  
6 renewed and it was time to decide what was going to happen with  
7 Bob Fiske, that panel coming out differently than DOJ.

8           So that's -- under the Ethics in Government Act, judges  
9 decide who the Special Counsel will be. Under the Reno  
10 Regulations, the Attorney General decides. So that's one.

11           The second is the -- the authority that is sort of  
12 invested in whoever is appointed into that role. And so under  
13 the Ethics in Government Act, under 594(a), I think it's pretty  
14 clear that Congress contemplated giving Special Counsel,  
15 appointed pursuant to that provision, the full and independent  
16 authority to exercise all investigative and prosecutorial  
17 functions and powers of DOJ and the Attorney General. So that  
18 the Ethics in Government Act created what was, in effect, a  
19 parallel Attorney General, somebody with that level of  
20 authority, appointed by courts, not the Attorney General who  
21 was in power at the time.

22           The Reno Regulations are very different in this  
23 respect. And so this is -- you know, I'm at point two of the  
24 differences in independence. It's comparing 594(a) to a couple  
25 of provisions in the Reno Regulations.

1           One is that the introductory -- introductory language  
2     in the Federal Register, which says -- and this is for the Reno  
3     Regulations -- says that: "Ultimate responsibility for the  
4     matter and how it is handled will continue to rest with the  
5     Attorney General."

6           THE COURT: That language doesn't feature in the  
7     ultimate codified rule; correct?

8           MR. BOVE: That's correct. There are some features of  
9     it that I think --

10          THE COURT: But what to make of that? Does it actually  
11     form part of the regulation?

12          MR. BOVE: It informs the analysis -- it's not part of  
13     the regulation, but it informs the analysis of what these terms  
14     that I'm about to describe mean, and how both the DOJ and  
15     Congress felt at this important period, for our motion, in  
16     1999. A period where there was a hearing on whether or not to  
17     renew the Ethics in Government Act, a period where Eric Holder  
18     went to that hearing and said: The Department of Justice  
19     thinks that the Ethics in Government Act should not be renewed  
20     because the special prosecutors appointed to that provision,  
21     among other things, are too independent.

22          And here the restrictions -- well, they didn't get that  
23     far at the hearing, but the point was that was very much  
24     language in the Federal Register that's consistent with the  
25     hearing that led to the EGA not being renewed.

1           And so where do we see that that's a relevant  
2   comparison to 549(a) in the Reno Regulations? 600.6 on the  
3   books right now gives the Special Counsel, appointed pursuant  
4   to that reg, the authority of all investigative and  
5   prosecutorial functions of any United States attorney. So  
6   the -- you know, instead of the full scope of the authority of  
7   the Attorney General under the EGA -- that's 594(a) -- 600.6  
8   restricts this to the authority of a United States attorney.

9           And there is another part that I think is important  
10   here; it's 600.7, paragraph B. That paragraph contemplates a  
11   situation where the Attorney General can review action by a  
12   special counsel appointed pursuant to the Reno Regulations, and  
13   decide that -- that the action, quote, "should not be pursued."

14           That is that countermanding concept, the veto concept  
15   that came up on Friday and it's relevant here. This -- this is  
16   part of it. This is point 2 on why a Special Counsel appointed  
17   pursuant to the Reno Regulations is not independent for  
18   purposes of the appropriation that we're talking about.

19           Point 3, this is a --

20           THE COURT: But you've argued that the Special Counsel  
21   is taking inconsistent positions. But are you just doing the  
22   same thing flip-flopped? So for appropriations, you want to  
23   say there is insufficient independence, but on the Appointments  
24   Clause matter with respect to superior/inferior, you're taking  
25   the opposite view?

1           MR. BOVE: No. I -- our principal point -- and the  
2 record, I think, is largely un rebutted. And there was an  
3 exchange at the rebuttal on Friday, where no information was  
4 provided about whether the Attorney General is actually  
5 overseeing this.

6           Our principal point is on the Appointments Clause.  
7 But -- because we understand that this motion and the text --  
8 it has two alternative bases. And I think, you know, we're  
9 very focused on the other law part, which is, the positions are  
10 consistent there. This is an alternative argument. I have  
11 given you our points --

12           THE COURT: Okay. So on the -- so this is -- I  
13 understand that your position on other law is the same, but  
14 with respect to the degree of independence, what I'm hearing is  
15 that it's an alternative argument to the principal submission  
16 which is that there is no other law; is that correct?

17           MR. BOVE: Correct.

18           And just that these things can't mean two separate  
19 outcomes on the -- based on the text that we're dealing with  
20 and the body of law that we're dealing with. Our position is  
21 that there is not sufficient oversight; our position is on the  
22 Appointments Clause.

23           THE COURT: But for the appropriations issue, if  
24 the -- if the prosecutor had to be equal to the independent  
25 counsel in the statutory scheme, then why would Congress have

1      referenced other law? Presumably, they don't need to be exact.

2               MR. BOVE: I think that the context of what Congress  
3      was doing in this appropriation, historically, is important.  
4      And I was hoping to cover some of that to get -- because I  
5      think it does bear on what they meant by "other law." And at  
6      the headline level, what was going on when this appropriation  
7      went on the books, is that there was, admittedly, some  
8      litigation over the Ethics in Government Act. But a week  
9      before this appropriation went on the books, the Ethics in  
10     Government Act had been renewed. And so it's in that setting  
11     that Congress uses some other language, I think, with some --  
12     with full confidence that the law -- that the EGA would be on  
13     the books for another five years.

14             And what else was going on? The other law that was in  
15     play mirrored exactly the Ethics in Government Act. What was  
16     going on was that the Watergate regulations gave the full scope  
17     of the type of independence that the Ethics in Government Act  
18     ultimately adopted. And I have said, the Iran-Contra  
19     regulations, which gave rise to that version of part 600, the  
20     predecessor version that mirrors the Ethics in Government Act  
21     were on the books. It happened again with the appointment of  
22     James McKay and the Nofziger regulations and then, I think,  
23     once more, with Bob Fiske, a regulatory independent counsel  
24     appointed pursuant to the old part 600 that had the similar  
25     levels of independence.

1           So when Congress, in 1987 in this appropriation, uses  
2     the term "other law," they are saying that in the context of a  
3     series of regulatory actions and litigation in court over what  
4     it means to be independent. And at that point, there was every  
5     suggestion that the political balance -- the people involved in  
6     that were comfortable with the level of independence that was  
7     reflected in the Ethics in Government Act. There  
8     wasn't -- it's not as if when this appropriation went on the  
9     books, that the Reno Regulations were in play and Congress was  
10    contemplating that at some point, years later, there would be a  
11    discussion about whether this was really the right path. That  
12    wasn't foreseeable to them at all.

13           And I think that that historical context, all of these  
14    regulations, the version of part 600 that was on the books at  
15    the time, the fact that the Ethics in Government Act had just  
16    been renewed, all of those features very much bear on, what did  
17    Congress mean by independent counsel in 1987?

18           And that's the ultimate question. And I drill a little  
19    bit of a temporal distinction with respect to how we think the  
20    Court should look at "other law," which is a present  
21    analysis -- analysis at present of whether there is another law  
22    that allowed for this appointment, versus what it means to be  
23    independent counsel, lowercase, in this appropriation.

24           We think "other law" is not an ambiguous statutory term  
25    in the appropriation, and so what has to happen is basically



1 the analysis that we talked a little bit this morning and on  
2 Friday, is there another law in November of 2022 that justified  
3 this appointment? But on -- when you get to this question,  
4 independent counsel, lowercase, there is ambiguity. And so  
5 then the question is: What did Congress mean when this  
6 appropriation was put on the books?

7 And so I won't go back through it, but I've talked a  
8 little bit about the historical context. But another place to  
9 look is the conference report that accompanied this  
10 appropriation, and that conference report is numbered 100-498.  
11 And there are two parts of it that I want to flag. And this  
12 is -- it's a very long report. I don't have the page numbers,  
13 but it's at the very end.

14 And Congress -- the conference addresses the two -- we  
15 talked about three textual provisions of this appropriation at  
16 the very beginning. The first refers to -- it starts: "That  
17 of the funds appropriated to DOJ." And there is a specific  
18 reference to activities of any independent counsel. It's the  
19 language that precedes the "provided further." The conference  
20 report makes clear that that money was intended to basically  
21 refund expenditures that had been made on continuing  
22 resolutions while DOJ was waiting for the Ethics in Government  
23 Act to be renewed. And so that explains what Congress meant at  
24 the first -- for that first --

25 THE COURT: Why is there a need to resort to

1 legislative history?

2 MR. BOVE: Because it's, we submit, an ambiguous term.  
3 So we need to look at the context, the historical context of  
4 what Congress would have been thinking about, the issues they  
5 were grappling with when they chose the phrase, lowercase,  
6 "independent counsel," and then, also, to look to the committee  
7 report to get a very specific sense, the compromises that led  
8 to these languages choices.

9 And I think that the next part of the conference report  
10 bears directly on the question of this note to 28 U.S.C. 591.  
11 And the conference report there is -- the discussion is limited  
12 to the Ethics in Government Act. They don't even address what  
13 other law might or could mean. And I think that's because at  
14 this point, as I said, the Ethics in Government Act had been  
15 renewed, and every regulatory action from DOJ contemplated the  
16 same level of independence that Congress had implemented in the  
17 Ethics in Government Act.

18 And so who cares? We care about that, Judge, because  
19 looking at what "independent counsel" means in this  
20 appropriation, we submit it's not consistent with what -- what  
21 we have under the Reno Regulations.

22 THE COURT: All right. You had identified your view as  
23 to some of the distinctions between the statutory framework and  
24 the Special Counsel regulations. I think you'd addressed 600.6  
25 and 600.7(b) .

1 Any other areas to identify?

2 MR. BOVE: Yes, Judge.

3 The third that I would flag relates to the policies and  
4 procedures to which special counsel are subject. And so under  
5 the Ethics in Government Act at 594(f)(1), that restricted  
6 independent counsel to complying with, quote, "written or other  
7 established policies of DOJ" -- quote, "respecting enforcement  
8 of the criminal laws."

9 So the Ethics in Government Act restricted policy  
10 compliance to written policies, and not -- not all DOJ  
11 policies, only DOJ policies that concerned enforcement of the  
12 criminal laws.

13 In the Reno Regulations, at 607, paragraph A, the  
14 Department of Justice expanded that language to cover rules,  
15 regulations, procedures, practices, and policies. And I think  
16 practices, in particular, is a very important limitation on a  
17 special counsel's ability to operate in a way that is  
18 consistent with the Reno Regulations, relevant to what was  
19 required under the Ethics in Government Act, written or other  
20 established policies. And, for example, practices is very much  
21 an issue in our selective prosecution motion; practices is very  
22 much an issue for the Justice Manual provisions that we have  
23 raised relating to election interference; and practices is  
24 especially an issue with respect to the distinct election  
25 interference we've raised regarding the 90-day rule that's

1 discussed in the Horowitz Report. And these are the kinds of  
2 things that we're told, pursuant to the Reno Regulations, this  
3 special counsel is subject to, that are very different from  
4 what was going on under the Ethics in Government Act.

5           And what happens when there is a conflict? I think  
6 that's another important question. From -- as best I can read,  
7 the Ethics in Government Act really conferred discretion on the  
8 Special Counsel to make decisions about when, whether, and how  
9 they were in compliance with the policies that were at issue  
10 under the EGA. The Reno Regulations in the same paragraph,  
11 607, paragraph A, contemplate a consultation with the Attorney  
12 General, and they contemplate that there may be situations  
13 where the Attorney General sort of chooses -- charts a  
14 different course for the -- for the Special Counsel. And so I  
15 think that that's another important consideration.

16           The last distinction between the two that I would like  
17 to draw, relates to the removal provisions. And so the removal  
18 provision of the Ethics in Government Act is 596(a), and it's  
19 focused on removal for good cause, disability, and conditions  
20 that substantially impair performance. It really -- I -- the  
21 text of that provision, 596(a), does not contemplate removal  
22 over disagreements between the Attorney General and the Special  
23 Counsel relating to how a case should proceed, disagreements  
24 relating to, you know, within the bounds of prosecutorial  
25 discretion, how that discretion should be exercised.

1           The -- the removal provisions -- and sorry. One more  
2 point on that.

3           Justice Scalia talked about what good cause meant under  
4 the Ethics in Government Act in his dissent in Morrison, and  
5 talked about how that was a restriction. And he cited to a  
6 report that related to the recent renewal of the Ethics in  
7 Government Act in '87 that I referenced, that basically equated  
8 good cause with misconduct. So that's -- that's a very high  
9 bar and hard to imagine reaching that in most situations. But  
10 the Reno Regulations do use that same phrase "good cause," but  
11 they include that the -- good cause will -- can consist of a  
12 violation of DOJ policy, which is, I think, a lower threshold  
13 for -- excuse me -- for removal than what we had in the Ethics  
14 in Government Act.

15           THE COURT: Okay. All right. Anything further on the  
16 motion?

17           MR. BOVE: The last point, Judge, on terms of remedy --  
18 we've talked about McIntosh and what I think are important  
19 subsequent district court proceedings. The other case that,  
20 sort of, at least in its reasoning, does -- operates in a  
21 similar way to McIntosh is -- I apologize to the court  
22 reporter -- Bilodeau, B-I-L-O-D-E-A-U, which is a First Circuit  
23 case from 2022 that cites McIntosh at 24 F.4th 705. And the  
24 language I'm focused on there is: We agree with this reading  
25 of the rider and conclude, as the Ninth Circuit did, that the

1 "DOJ may not spend funds to bring prosecutions if doing so  
2 prevents a state from giving practical effect to its medical  
3 marijuana laws." In other words, if doing so is inconsistent  
4 with the restrictions that are in the appropriation.

5 And I don't think there -- there is no substantive or  
6 material distinction to be drawn between the affirmative  
7 restriction on expenditures at issue in cases like McIntosh and  
8 Bilodeau, and in the language of the appropriation that we're  
9 focused on here. The bottom line, for purposes of our motion,  
10 is that under the Appropriations Clause, in order for the  
11 separation of powers to operate as it must under the  
12 Constitution, the Special Counsel can only draw an  
13 appropriation where his conduct, his activities, meet the text  
14 of what the appropriation authorized. And because there is no  
15 other law, and because for purposes of this motion we also  
16 think that independence is a real problem, this appropriation  
17 should not be accessed.

18 THE COURT: All right. Thank you, Mr. Bove.

19 Let me hear from counsel for the Special Counsel.

20 Good morning.

21 MR. PEARCE: Good morning. May it please the Court.

22 James Pearce for the United States.

23 Consistent with long-standing Department of Justice  
24 practice, the government has funded the Special Counsel through  
25 a Congressionally-enacted permanent and definite appropriation

1 passed in December of 1987. Under the plain terms of that law,  
2 the Special Counsel is an independent counsel appointed by  
3 other law, including 28, United States Code, 515(b) and 533(1),  
4 as we discussed extensively last week. But even if the  
5 permanent and definite appropriations were not available --

6 THE COURT: So you agree that the "other law" is a  
7 statutory law that you've pointed to elsewhere?

8 MR. PEARCE: We do. I think I heard my friend on the  
9 other say -- side suggest we were relying on the regulations.  
10 We think it is the statutory law.

11 THE COURT: Okay.

12 MR. PEARCE: And the regulations don't provide  
13 the -- independently for the appointment, but certainly, as we  
14 discussed last week, once in place, are binding while extant.

15 THE COURT: And you agree this is -- this is a  
16 limitless appropriation?

17 MR. PEARCE: Consistent with the idea of a permanent  
18 indefinite appropriation, when Congress enacted it using that  
19 term, that is the function that it had. There are a handful of  
20 other permanent and definite appropriations. It does have that  
21 function.

22 THE COURT: Can you point me to any comparable  
23 limitless appropriation?

24 MR. PEARCE: Yes. So 31, United States Code -- I think  
25 it's 1504 has one. Let me see if I can find it. There are two

1 in 31, United States Code. One has to do with refunding moneys  
2 that were improperly deposited into the treasury, and the other  
3 is for paying of judgments. I can give the Court the statutory  
4 cites.

5 THE COURT: I have the first one. 31 U.S.C. 1504.

6 MR. PEARCE: Yeah. I apologize, because I had it on  
7 hand and I cannot seem to find it.

8 THE COURT: That's okay. We'll revisit this.

9 MR. PEARCE: Yeah. But the point is there are at  
10 least -- so, the GAO has issued something called the -- it's  
11 something like "The Handbook on Federal Appropriations Law"  
12 where it defines a permanent indefinite appropriation,  
13 explaining that it is not limited by time or limited by amount,  
14 and gives some examples, including the two that I have  
15 mentioned.

16 THE COURT: Okay. And neither of those examples  
17 contains any other formula or percentage or other means by  
18 which to impose at least some degree of a cap. And I know in  
19 the CFPB case, most recently, there was a percentage threshold  
20 which features in that decision as one reason why it wasn't  
21 problematic.

22 MR. PEARCE: So a couple of different responses, but I  
23 found the cites, if I can give them --

24 THE COURT: Okay.

25 MR. PEARCE: -- to the Court, and then address the



1 question.

2 THE COURT: Let's do that.

3 MR. PEARCE: So at 31 U.S.C. 1304 -- I think I said  
4 1504 -- so 1304 addresses the payment of judgments against the  
5 United States. And then 31, United States Code, 1322(b)(2) is  
6 the provision that deals with refunding amounts erroneously  
7 collected and deposited into the treasury.

8 I think the Court's question involved whether there's  
9 any other authority that addresses situations where there is  
10 not some kind of a cap. I'm not aware of any law, and I don't  
11 read, actually, the Supreme Court's decision in the recent CFPB  
12 case to rely on the fact that there was the inflation -- the  
13 cap that was adjusted for inflation that came out of the  
14 federal -- the -- I think it was the Federal Reserve Board.  
15 The Court described that by way of background, but certainly it  
16 just said source and purpose is what's required to comply with  
17 the Appropriations Clause.

18 THE COURT: Well, the thrust of that decision does seem  
19 to be repeatedly focused on the existence of a cap,  
20 which -- which does play into the majority opinions rationale.  
21 But setting that aside for a moment, as far as the  
22 current -- the current appropriation, do you agree with your  
23 friend on the other side that the statutory language that we're  
24 looking at is the -- provided further, ending with the words  
25 "other law"?

1           MR. PEARCE: Yes. I think there's other pieces that  
2 are relevant; for example, the reference earlier to -- you  
3 know, capital letter, Independent Counsel, and then the later  
4 reference to independent counsel in lowercase that suggests  
5 that -- the difference between the two.

6           THE COURT: Okay. So -- but I want to make sure that I  
7 have exactly -- what are we talking about when we say 28 U.S.C.  
8 591 note? What's actually in the note? What is surviving  
9 statutory text?

10          MR. PEARCE: So I'm not sure precisely what remains in  
11 the note, but I can tell you that "a permanent and definite  
12 appropriation established," that is still, you know, operative  
13 language on which the -- the appropriation is based.

14          THE COURT: So is it just what I have indicated?  
15 Starts with "provided further, 28 U.S.C. 591 note," and it ends  
16 with the words "other law"?

17          MR. PEARCE: That is what I understand my friends on  
18 the other side to challenge, and I think that is the core of  
19 what the Court is to focus on. I don't under -- frankly,  
20 the -- in between the quotation marks, the 28 U.S.C. 591 note,  
21 I don't think that that plays any role in the analysis here.

22          The only point that I was making was where -- earlier  
23 in this appropriation, there was the specific appropriation of  
24 an amount not to exceed \$1 million that says "related to the  
25 activities of any independent counsel." That just furthers the

1 distinction between the statutory independent counsel under the  
2 Ethics in Government Act from independent counsel appointed  
3 pursuant to other law, which is, of course, what we in the  
4 Justice Department, for at least eight special counsels, has  
5 relied on in using the permanent indefinite appropriation.

6 THE COURT: Okay. I'm still not entirely clear on what  
7 statutory language survives for the appropriation. And I just  
8 want to make sure that I'm looking at the surviving codified  
9 text --

10 MR. PEARCE: Uh-huh.

11 THE COURT: -- in current law. So is it -- is it that  
12 one reference, or is it some broader public law? Because I  
13 understand there's been various amendments over the years to  
14 the language.

15 So can you just clarify for the Court what specific  
16 statutory language encompasses the appropriation that we're  
17 discussing?

18 MR. PEARCE: "Provided further, 28 U.S.C. 591 note,  
19 that a permanent indefinite appropriation is established within  
20 the Department of Justice to pay all necessary expenses of  
21 investigations and prosecutions by independent counsel  
22 appointed pursuant to the provisions of 28 U.S.C. 591, et seq,  
23 or other law."

24 THE COURT: Okay. Thank you. All right.

25 MR. PEARCE: So we think the principal question -- it

1 really boils down to what is an independent counsel? And the  
2 regulations, the GAO opinions, the two courts' decisions that  
3 have addressed this, both in the Stone and the Hunter Biden  
4 case, as well as the longstanding practice of the department  
5 funding eight special counsels under this appropriation with  
6 Congressional acquiescence, all answers that in the  
7 affirmative, that the Special Counsel is an independent  
8 counsel.

9 Now, I'm not going to --

10 THE COURT: The Doctrine of Congressional Acquiescence  
11 is not the most robust doctrine, I think case law would  
12 indicate. So can we just focus on the text of the "other law"  
13 and just confirm -- I take your position to be that your  
14 arguments carry over completely from -- from the -- from the  
15 Appointments Clause context.

16 MR. PEARCE: Yes. And I have no reason to repeat them,  
17 unless the Court wants to hear them.

18 THE COURT: No, no. That's okay.

19 Okay. And you agree, of course, that Special Counsel  
20 in this case was not appointed pursuant to 28 U.S.C. 591, which  
21 doesn't exist; so we're focused again on the other law piece.

22 MR. PEARCE: Yes. And relying on the same statutes we  
23 discussed on Friday.

24 THE COURT: Okay. Now, I noticed there were some  
25 reports on the Special Counsel's Office web page indicating the

1 expenditures for six months. Is this a six-month practice, to  
2 issue statements of expenditures?

3 MR. PEARCE: Yes. It's my understanding that for  
4 six-month periods that run from March to September, Special  
5 Counsel's Offices -- and one can find them for, I believe, all  
6 eight that I have mentioned -- issue their expenditure reports.  
7 The precise timing of it, I think, is not always identical, but  
8 they do come out in six-month increments.

9 THE COURT: So the last report would have been issued  
10 when?

11 MR. PEARCE: I believe the last report covers the  
12 period ending in September 2023. There is a report that is  
13 due -- that ends of March 2024 that has not been made public  
14 yet.

15 THE COURT: How long does it take for the reports to  
16 become public? Because we're in June now.

17 MR. PEARCE: That's what I was just alluding to a  
18 moment ago. That is something that is, I think, outside of our  
19 office's control, that there is -- the GAO -- well, actually,  
20 I'm not sure if the GAO is involved in that specific portion of  
21 it. I think, from just looking at the past reports, and this  
22 is not a scientific answer, but sometimes it's taken as long as  
23 a year. I think in -- in -- for this Special Counsel, it is  
24 considerably less of a period of that.

25 But, for example, in our supplemental brief, we, I

1 think, cited a report that involved a report of four different  
2 independent counsels, three under the Ethics in Government Act,  
3 one independent regulatory counsel. And that had issued a full  
4 year after the period that it covered. These come out more  
5 quickly, but I cannot give the Court a more precise date.

6 THE COURT: And that's because -- what is the review  
7 process? I know the regulations reference the initial  
8 establishment of a budget and review by the Attorney General,  
9 but what is the continuing review process for the budget  
10 proposals and the expenditures?

11 MR. PEARCE: I am -- I don't know precisely, other  
12 than -- what I just understand is generally accounting --  
13 generally accepted accounting practices, to track the funds and  
14 make sure that they are enumerated for purposes of identifying  
15 an expenditure.

16 Beyond that, I don't have anything I can share with the  
17 Court.

18 THE COURT: Okay. So, then, in terms of looking at the  
19 actual expenditures, just taking one as an example, there is  
20 one from the period of November 18th of '22 through March of  
21 2023 with total SCO expenditures at 5.4 million. And then if  
22 you refer further down in the report, there's a reference to  
23 DOJ component expenses for another 3.8 million, again, for the  
24 six-month period.

25 I just have a clarifying factual question. The

1 3.81 million coming for, what is described as, expenses  
2 supporting the Special Counsel's Office, are those also being  
3 paid for through the permanent indefinite appropriation?

4 MR. PEARCE: Top line answer, I don't know. I believe  
5 it is true that that -- that -- well, it is paid -- everything  
6 is paid for under the permanent indefinite appropriation, with  
7 the caveat that -- and I'm not sure if this is in the  
8 regulation -- but there is some sense that for individuals,  
9 like myself, who are on detail from other parts of the Justice  
10 Department, consistent with the regulations saying, "All parts  
11 of the Justice Department should support the Special Counsel,"  
12 I believe that those individuals are funded by their existing  
13 components. But I don't want to say I'm certain about that.  
14 That is my understanding, however.

15 THE COURT: So I'm just trying to just get a sense,  
16 just monetarily, for that six-month period. It says, "Total  
17 SCO expenditures, 5.4 million," but is it really more like 9  
18 when you include the expenditures for the DOJ component  
19 expenses that are also being paid for by the indefinite  
20 appropriation?

21 MR. PEARCE: I -- I am not sure, is the -- is the  
22 precise answer. I mean, we can certainly give the Court  
23 something supplementally to enumerate with more precision, to  
24 the extent that's consistent with our role in providing  
25 information to the Court.

1 But I don't know the answer --

2 THE COURT: I think it would be helpful, since these  
3 are public documents, just trying to understand what the full  
4 universe of expenditures looks like. Since this is an  
5 Appropriations Clause challenge, I do think it provides some  
6 helpful context for the amount of money that is actually being  
7 spent.

8 MR. PEARCE: I think that's fair. But just to be  
9 clear, there is certainly no case, of which I'm aware, where  
10 any court has suggested -- or at least any court that hasn't  
11 been overruled or reversed -- that the total amount of the  
12 expenditure is relevant to an Appropriations Clause challenge.

13 I agree with the Court --

14 THE COURT: But when it's limitless, I think that there  
15 is a separation of powers concern that one needs to take a look  
16 at.

17 Don't interrupt, please.

18 MR. PEARCE: I'm sorry, Your Honor.

19 THE COURT: And so that's the nature of my question.

20 MR. PEARCE: Could I just address that with one point,  
21 Your Honor? If not, I'm happy to just respond, but I -- there  
22 is one thing I would like to say in response to that.

23 THE COURT: You may.

24 MR. PEARCE: So I agree that that is absolutely -- what  
25 you have just described is absolutely the thrust of the 5th



1 Circuit's opinion in the CFPB case that the Court then -- that  
2 the Supreme Court then reversed.

3 And so I do think that there was that very separation  
4 of powers concern there, but I read the Supreme Court's  
5 decision saying what we are focused on is source and purpose.  
6 And simply describing the cap is actually, essentially,  
7 entirely doing away with the rationale that there is a  
8 separation of powers problem.

9 THE COURT: Well, the Supreme Court, did it have  
10 occasion to address the remedy, however, in CFPB, because it  
11 found a lawful appropriation, and then -- so it didn't really  
12 need to cover what to do about it? Would you agree with that?

13 MR. PEARCE: I would certainly agree that there was no  
14 cause to address remedy there.

15 THE COURT: Okay. All right. Now, let's see here.  
16 You've mentioned in your opposition that DOJ could readily fund  
17 this through an alternative source. I wanted to give you an  
18 opportunity to identify what that other alternative would be.

19 MR. PEARCE: So it's at a relatively high level of  
20 generality, but the Department of Justice has appropriated, at  
21 least in the 2023 appropriation cycle, over a billion dollars.  
22 And I can represent to the Court that the government is  
23 prepared to use money from -- money that is appropriated to the  
24 Department of Justice to fund the -- the activities and  
25 operations of the Special Counsel.

1           A more specific --

2           THE COURT: And that's just through the standard  
3 Department of Justice allotment for, let's say, fiscal year  
4 2024?

5           MR. PEARCE: That is my understanding, yes, Your Honor.

6           THE COURT: What are your views, if any, on any prior  
7 expenditures? So to the extent you're -- to the extent, A,  
8 there is a need to even tap an alternative funding source,  
9 which, again, is to be determined, then what to do, if  
10 anything, about the prior expenditures, in your view?

11          MR. PEARCE: Just so I -- to clarify so I understand  
12 the question, on the assumption or on the -- kind of, the  
13 operating hypothesis that we were -- the Special Counsel  
14 was -- had not been entitled to; correct?

15          THE COURT: That's correct.

16          MR. PEARCE: So I think that retrospectively, there  
17 should be no effect or change whatsoever. And there are a  
18 couple of different places that I draw from in making that  
19 point. One, I think the Court, the Supreme Court in a couple  
20 of different contexts has suggested that you don't go  
21 retrospectively -- look retrospectively to try to undo acts  
22 that have happened. Most recently -- this is a decision a week  
23 from Friday -- the United States Trustee v. John Hammond [sic]  
24 involved a challenge under the Constitution's requirement that  
25 bankruptcy laws be uniform. And there was a disuniformity

1 because there were fees that had been assessed in one place and  
2 not in others. And the question was all about remedy there,  
3 and it was, do we have some sort of retro- --

4 THE COURT: And I'm sorry. Where is that decision  
5 coming out of?

6 MR. PEARCE: The United States Supreme Court.

7 THE COURT: In the Hammons case?

8 MR. PEARCE: The Hammons case, yes.

9 THE COURT: Yes.

10 MR. PEARCE: And the decision was -- or the question  
11 for decision was: Do we look retrospectively or retroactively,  
12 or is it a question of prospective parity? And the Court there  
13 decided prospective parity was appropriate.

14 In addition -- and there was some reference in this,  
15 actually, in some of the amicus filing, and we had a footnote  
16 on it -- but the de facto officer doctrine which provides --  
17 and this is cases like Ryder and Nguyen, although those come up  
18 in the adjudicative context. There is a much older body of law  
19 starting with a Supreme Court case called Norton v. Shelby  
20 County from 1885 [sic], that basically says courts  
21 don't -- it's a -- it's a common law approach because the  
22 Constitution doesn't prescribe remedies for its own violation.  
23 But courts don't go back and sort of undo -- if there's a  
24 violation -- undo everything that has happened before it.

25 THE COURT: On that de facto piece, I didn't see a

1 substantive response in your opposition or to the Tillman  
2 brief. It was, I think, flagged in a footnote but not  
3 addressed. So what is the position of the Special Counsel on  
4 application of the de facto officer doctrine? Because it  
5 wasn't briefed.

6 MR. PEARCE: And just to be clear, that obviously came  
7 up in the context of an Appointments Clause or employee  
8 challenge.

9 I think it's -- it's twofold. One is the top-line  
10 position that I just gave with respect to appropriations, which  
11 is that we believe that de facto officer doctrine, to the  
12 extent the Court were to find error or some sort of  
13 constitutional, or, frankly, statutory violation with either  
14 the appointments or the appropriations funding clause; but  
15 then, second, to the extent that the Court is seriously  
16 entertaining the notion that there is a constitutional or  
17 funding problem, I actually think it would behoove the Court  
18 and the parties to have some additional briefing.

19 I heard my friend on the other side mention a couple of  
20 different things that weren't, I think, in their brief or their  
21 reply. And so to the extent they would rely --

22 THE COURT: So this would be supplemental briefing on  
23 what exactly?

24 MR. PEARCE: So if the Court -- and I would -- I think  
25 the Court should -- should decide the top-line question, and if

1     there is a serious -- if the Court is seriously considering  
2     finding a violation of --

3             THE COURT: I'm not indicating anything. I'm simply  
4     just trying to cover the scope of what's been briefed here.  
5     One piece was the de facto officer doctrine, and it was  
6     conspicuously not answered by the Special Counsel in the  
7     opposition or in the response to the Tillman -- excuse me --  
8     the constitutional -- well, no, excuse me -- the Tillman brief,  
9     as I said initially. That's why I'm asking what the position  
10    is on the de facto officer doctrine. I hear you say that you  
11    think it would apply if it ever needed to come into the  
12    picture. And your best authorities for that are?

13            MR. PEARCE: As I -- as I was giving sort of. Norton  
14    v. Shelby County from 1885 is -- is, I think, widely seen as  
15    the leading case. The more modern versions of it are Ryder and  
16    Nguyen.

17            Again, because this hasn't been briefed, I can let the  
18    Court know the position of the United States was articulated  
19    starting at page 26 of the -- of the government's brief in the  
20    PROMESA Supreme Court case. There is a long discussion of it.

21            But if the Court were interested in more information on  
22    this, then I -- I could -- I do think that some sort of  
23    supplemental briefing would be appropriate.

24            THE COURT: Why was it not included in the initial  
25    submission if it was -- if it was discussed, at least

1 peripherally in the briefing? I just -- it just seemed -- I  
2 wasn't sure why it wasn't addressed, and it was just footnoted  
3 but then not developed.

4 MR. PEARCE: So the only place that it was meaningfully  
5 raised was in the Tillman brief, which argued, of course, that  
6 the Special Counsel is an employee and not an officer at all.  
7 To be candid with the Court, we find that to be not a  
8 frivolous, but a -- an argument that finds no support in case  
9 law and, thus, didn't warrant a developed substantive response  
10 in that context.

11 THE COURT: Okay.

12 MR. PEARCE: You obviously have addressed the question  
13 of remedy for the Appointments Clause. You had some discussion  
14 with my friend on the other side; perhaps we will have some  
15 discussion as well. But that is why we didn't see that it was  
16 appropriate, given space constraints --

17 THE COURT: Understood.

18 MR. PEARCE: -- to develop it further.

19 THE COURT: Okay. Now, let's return to some of those  
20 initial questions I asked Mr. Bove. There is an argument about  
21 standing, sort of, in quotes, and I wanted to hear your view on  
22 that. And I also wanted to hear your view on whether this is,  
23 in fact, a constitutional challenge.

24 MR. PEARCE: So I will go in that order. The standing  
25 in quotes is because we don't think that while the -- while the

1 defendants can raise a motion to dismiss, the relief they seek,  
2 namely dismissal -- and this ties in, actually, with the  
3 conversation that we were just having -- doesn't follow from  
4 a -- a challenge to the -- the funding or Appropriations  
5 Clause; that's the second question. And there is no Court  
6 that, I think, has -- has discussed this; right?

7 So there was -- Stone had no reason to address the --  
8 kind of, the remedy question, whether someone was -- because it  
9 disagreed on the substantive question.

10 THE COURT: Of course.

11 MR. PEARCE: As to McIntosh, I think that's just a --  
12 really, a very different case. That was an -- of course, as  
13 the Court is aware, an appropriations rider. Rather than  
14 saying: Is there an appropriation that funds the prosecution,  
15 it was, instead, a -- a rider that prevented the expenditure of  
16 any federal funds to -- to prosecute.

17 THE COURT: But either way, there was an argument that  
18 there lacked statutory authorization for the expenditure. So  
19 meaningfully, how do you differentiate the standing inquiry  
20 between this situation and what the Court in the McIntosh case  
21 encountered?

22 MR. PEARCE: And this is why I'm trying to -- to walk  
23 back a little bit, this notion of standing. I -- I don't --  
24 we're not trying to take the position that they can't get up  
25 here and argue that there is some sort of a problem with the

1 funding. It's just it does not flow from that, that there is  
2 dismissal, if that is, in fact, correct. Frankly, we think  
3 nothing should happen given the representation that we can fund  
4 it alternatively.

5 Now, I -- I --

6 THE COURT: Now, on the -- on the representation that  
7 you can fund it alternatively, what sort of substantiation can  
8 you offer about, sort of, the ease with which the Department  
9 could -- could locate what is not an insignificant number as  
10 we -- as we mentioned earlier?

11 MR. PEARCE: I can't stand before the Court and say it  
12 would be done in one day, two days, five days. I can say that  
13 it is the full commitment of the Department of Justice to  
14 ensure that the Special Counsel has the funding that it needs  
15 to continue in -- in this prosecution.

16 THE COURT: Okay. So you're not pursuing a traditional  
17 standing objection, it's more in the vein of the remedy to be  
18 sought?

19 MR. PEARCE: And the -- hence, that's why, in our  
20 brief, we didn't start it. I mean, naturally, a standing  
21 question would be one that what -- that would be addressed  
22 first. It was -- after we addressed the substantive question,  
23 it was to make the point that the defendants cannot  
24 get -- or -- or should not be entitled to the relief that they  
25 seek.



1           THE COURT: Okay. Now, so what about the -- there is  
2   an argument in the supplemental brief about how the -- the  
3   motion doesn't present a constitutional challenge to begin  
4   with. And I wanted to hear your view, in light of some of the  
5   Supreme Court characterizations of these challenges, as  
6   instances in which the payment of money needs to be authorized  
7   by a statute.

8           MR. PEARCE: So I -- I guess I don't see a whole lot  
9   turning on the answer to this question one way or the other.  
10   We still take the view that what they are challenging is the --  
11   that application of this particular statute, and whether or  
12   not, principally, the Special Counsel is an independent  
13   counsel, also, the -- the "other law" piece. And, in our view,  
14   that is a question of statutory interpretation and, thus, a  
15   statutory issue.

16           To the extent that -- that they would like --

17           THE COURT: But that's what I want to develop here. I  
18   mean, how is it not a constitutional challenge, when you have  
19   the Appropriations Clause requiring or indicating that no money  
20   shall be drawn from the Treasury. But in consequence of  
21   appropriations made by law, you have Supreme Court cases saying  
22   that in assessing this question, we have to determine whether  
23   payment of money was authorized by a statute, and that's the  
24   argument being raised. How is it not a constitutional  
25   challenge under the Appropriations Clause?

1 MR. PEARCE: I don't want to fight this too much  
2 because, as I said, I don't think it -- much actually turns on  
3 it. I think our position would be, there are clearly moneys  
4 appropriated to the Department of Justice that can be expended  
5 on behalf of a special counsel. The fact that we draw from the  
6 permanent indefinite appropriation, as opposed to, as I've  
7 represented to the Court, some other place, is sort of an  
8 allocation question, not necessarily --

9 THE COURT: But do you have any basis to believe that  
10 it's not a constitutional challenge? On the one hand, you  
11 could have a constitutional challenge, and then a  
12 nonconstitutional one. And I want to just make sure that the  
13 answer to that question is clear.

14 I haven't heard anything in your presentation to  
15 dissuade from the view that it is, in fact, a constitutional  
16 challenge.

17 MR. PEARCE: Again, I -- I don't need to fight it. I  
18 think that -- the fact that there -- that what we are trying to  
19 figure out is statutes make it statutory. The Court isn't  
20 persuaded. Again, it's not something -- it's not a hill on  
21 which I feel inclined to die. So...

22 THE COURT: Well, I certainly don't want that to  
23 happen, Mr. Pearce. You're doing a very fine job arguing. So,  
24 all right.

25 Let's see. Any other matters to raise with the Court

1 on the funding challenge?

2 MR. PEARCE: So to -- to kind of get back to the  
3 arguments that I think my friend on the other side sort of  
4 really focused on is whether the Special Counsel is an  
5 independent counsel. In our view, that -- the answer to that  
6 is yes. It flows from the regulations, GAO opinions, the two  
7 courts that have looked at it. I know the Court -- I mentioned  
8 also Congressional acquiescence, but I do think it is relevant  
9 that all eight of the Special Counsels -- one independent  
10 regulatory counsel, all seven of the special counsels that have  
11 existed have been funded under the permanent indefinite  
12 appropriation. I will say I --

13 THE COURT: All of those -- all of those funding  
14 approvals, they all sort of trace back to the same -- same  
15 statutory basis that you're bringing forward now; correct? The  
16 515 and the 533?

17 MR. PEARCE: Yes, that's -- that is my understanding.  
18 Yes.

19 THE COURT: Okay.

20 MR. PEARCE: And I -- and I'm -- I will stipulate I  
21 agree that under the Ethics in Government Act, that independent  
22 counsel had greater independence than the Special Counsel does  
23 under the Special Counsel regulations. But, again, consistent  
24 with the things I have just mentioned, GAO, the -- sorry -- the  
25 regulations themselves, GAO, and the two courts that have

1 looked at this, it's -- it's our view that there is sufficient  
2 independence. There's no day-to-day supervision. There is the  
3 fact that under 600.6, the Special Counsel has the full  
4 independent authority -- I think my friend on the other side  
5 quoted it, but omitted the word "independent." And the very  
6 purpose, of course, of the regulations was to strike that  
7 balance between independence, but not so much independence that  
8 became problematic under the EGA, some degree of accountability  
9 as well.

10 THE COURT: So you acknowledge there is some -- some  
11 reduction in the independence, compared to the independent  
12 counsel's statute framework. But in your view, there's still  
13 sufficient independence under the regulatory framework.

14 Is that a fair characterization?

15 MR. PEARCE: That is a fair characterization. I  
16 believe that characterization also applies to the GAO's views  
17 as of 2004 and going forward. GAO, of course, a part of  
18 Congress. As well as the views of the judges overseeing the  
19 Stone and the Hunter Biden matters.

20 THE COURT: So if you were to address more  
21 particularly, though, let's say, taking the -- the removal  
22 mechanism, how would you -- how would you say the independence  
23 is comparable?

24 MR. PEARCE: Yeah. I mean, that's -- I think that's an  
25 interesting question. Because on the one hand, there was for

1 cause removal under the Ethics in Government Act, and there was  
2 for cause removal under the regulations as well. And I think  
3 those two are -- there's no difference between the two.

4 But, of course, as we did mention when we discussed  
5 this on Friday, unlike under the old EGA regime, there is the  
6 possibility for the Attorney General to rescind the  
7 regulations, to modify or rescind the order. I don't think  
8 that that means that there is, therefore, less -- or that there  
9 is no independence. It just makes sure that the Attorney  
10 General is, in fact, the principal officer supervising and  
11 overseeing the Special Counsel.

12 THE COURT: Are you aware of any regulation in the  
13 space ever being rescinded?

14 MR. PEARCE: Any regulation, sorry, in the --

15 THE COURT: In this space, in this special prosecutor  
16 arena.

17 MR. PEARCE: I believe that the various, kind of,  
18 one-off regulations have been rescinded or certainly repealed  
19 as new ones have come into place.

20 THE COURT: But no recision of the regulation in this  
21 midstream appointment; correct?

22 MR. PEARCE: I am -- I am not aware of that, no.

23 THE COURT: Okay. So -- because there's a lot of  
24 reliance on history and historical practices, and then there's  
25 this -- this suggestion that, because the regulation can be

1 repealed at any time, there's -- there's a degree of control  
2 there.

3 But in reality, has a regulation like this or an  
4 appointment order ever actually been rescinded?

5 MR. PEARCE: So as I said, I'm not familiar with any  
6 rescission of a regulation. There certainly have been special  
7 prosecutors who have been fired, not only the sort of famous  
8 Saturday night massacre, but going back historically --

9 THE COURT: But in the end, in that scenario, there was  
10 a prosecutor that was ultimately reinstalled who completed his  
11 work or her work; correct?

12 MR. PEARCE: That's correct, yes.

13 THE COURT: So, then, this notion of rescission is a  
14 potential vacatur, so to speak, of appointment orders. Is it  
15 really, sort of, an illusory possibility?

16 MR. PEARCE: I think that's not in the least correct,  
17 and I think that --

18 THE COURT: Why not?

19 MR. PEARCE: So I think I addressed this when we talked  
20 about it on Friday. I think the way that courts, and most  
21 importantly the Supreme Court, have discussed this is not  
22 looking at, you know, was there the exercise of the potential  
23 powers of the principal officer or supervisor or director? It  
24 was: Did that principal officer or supervisor or director have  
25 the ability to do it?

1 I think I quoted or cited the penultimate paragraph  
2 from the Arthrex decision, where the Chief Justice, I think,  
3 said something like where the director had the discretion to  
4 overrule the administrative patent judges. It's not a  
5 question, thus, of what happens, you know, in reality every  
6 day. It is: What are the, sort of -- under the statutory or  
7 regulatory or relevant legal framework, what are the -- how is  
8 power and -- sort of, structured?

9 THE COURT: I recall in Attorney General Reno's  
10 statement in 1999, going through some of the pitfalls with the  
11 former statute, one concern was that, realistically, the  
12 political pressure was just too enormous to -- to ever -- ever  
13 yank, so to speak, a special prosecutor.

14 But it seems, that in terms of historical practice,  
15 that there hasn't really been any change because there's no  
16 example of any special prosecutor ever being removed from  
17 office.

18 MR. PEARCE: Well, again, there is some that predates  
19 the Reno Regulations. But I think the answer to that is, under  
20 the Armstrong case, the, sort of, presumption of regularity,  
21 the notion, as I represented in court, that special counsels --  
22 I'm not going to speak for those, but I will speak for ours --  
23 have complied with -- whether it was a regulatory -- whatever  
24 the specific framework was, typically regulatory, to ensure  
25 that they are following Justice Department policy, that they

1 are complying with any, kind of, consultation or other  
2 requirements.

3 I think that's the best account as to why there hasn't  
4 been a termination of a special prosecutor. Again, I will  
5 speak only on behalf of ours, but I think that's probably the  
6 best way to understand that history.

7 THE COURT: So I think you have used the term  
8 "regulatory Special Counsel," and I have heard that term in  
9 some of the materials. Is that -- what does that mean, a  
10 regulatory Special Counsel?

11 MR. PEARCE: So I think it's actually a little bit of a  
12 misnomer. I think what it -- what it specifically was applied  
13 to, as I -- as I understand, it was really Robert Fiske,  
14 because he was the one special prosecutor, special counsel, who  
15 was appointed at a time when the Ethics in Government Act had  
16 lapsed and before it was reauthorized, that period from the end  
17 of 1992 through -- I think it was June 30th of 1994.

18 And so he was appointed there -- I say a misnomer  
19 because, as our conversations have -- today and Friday have  
20 indicated, I think there has to be a statute backing that up.  
21 So I think it has to have been under 515(b) or 533. But then I  
22 understand the term "regulatory Special Counsel" -- or I think  
23 it was "regulatory independent counsel," to differentiate  
24 between a counsel who had been appointed under the statute,  
25 that is the Ethics in Government Act, from someone who had been



1 appointed under the Attorney General's independent statutory  
2 authority, and then operating under regulations of the Justice  
3 Department as opposed to the EGA.

4 THE COURT: So are you saying the term "regulatory  
5 Special Counsel," for example, in the GAO reports would concern  
6 only those folks who had particular regulations passed during  
7 those periods of time when the statute was constitutionally in  
8 question?

9 MR. PEARCE: I -- I read the GAO reports to refer to  
10 regulatory independent counsel as sort of synonymous with  
11 Special Counsel in the modern era; meaning we distinguish it  
12 from those people who were made independent counsel, capital I,  
13 capital C, under the statute from those who have been come into  
14 power because of the independent statutory appointment by the  
15 Attorney General, and then that Special Counsel's operation  
16 under the operative regulations.

17 THE COURT: Well, it's just interesting. I mean, why  
18 would you call them a regulatory Special Counsel? It just kind  
19 of begs the question: Well, where is the statutory authority  
20 if we're describing them as such?

21 MR. PEARCE: So I think it's -- I think it's actually  
22 independent -- and probably was my mistake to say it -- I think  
23 it's independent regulatory counsel, not independent Special  
24 Counsel. And that's -- I think the question you just asked is  
25 why I think it's a misnomer; right? Because I think it is

1 making -- it is drawing a quick and easy --

2 THE COURT: But maybe it's telling.

3 MR. PEARCE: Well, I mean, first of all, it applies  
4 just to Robert Fiske. But I think it's a --

5 THE COURT: Why does it apply only to him?

6 MR. PEARCE: Well, you know, it actually could apply to  
7 the three also from former Attorney General Bill Barr that we  
8 identified in our supplemental briefing -- our supplemental  
9 notice last night.

10 For the reason I think I just gave, but to make sure  
11 I'm clear, Robert Fiske was not appointed under the EGA  
12 statute. It didn't exist at the time. It had lapsed. It  
13 hadn't been expired. I think you would also say that with  
14 respect to Frederick Lacey, Malcolm Wilke, and Nicholas Bua.  
15 Although the IC statute, the EGA, was in existence, the  
16 Attorney General there decided to use his own statutory  
17 authority and make them -- and sort of have -- have supervision  
18 over them through the regulations. So there was -- they were  
19 independent regulatory counsel.

20 THE COURT: What's your best resource for this, kind  
21 of, historical survey of special prosecutors, sometimes  
22 referred to as independent counsels and, you know -- or  
23 regulatory special counsels? Where is there the most  
24 comprehensive historical survey of each of these individuals?

25 MR. PEARCE: I'm glad you asked. You asked that a

1 couple of times. You didn't ask me, and I wanted to give you  
2 my recommendations.

3 I think there is a book by Terry Eastland, I think  
4 called "Ethics" -- I can't remember the next part -- "and the  
5 Independent Counsel." It was written in 1989, so it's somewhat  
6 dated. But I think it has a very -- I'm not sure I'd call it  
7 comprehensive, but certainly a more developed historical  
8 discussion than a lot of the other sources.

9 THE COURT: It's cited, I think, by Justice Kavanaugh.

10 MR. PEARCE: Exactly. That was going to be my next --

11 THE COURT: Okay.

12 MR. PEARCE: Justice Kavanaugh cites it in that  
13 independent counsel and the presidency article, which I think  
14 also has some helpful history. But a lot of it is derivative  
15 on the Eastland book.

16 THE COURT: Point. Okay. All right.

17 Now, what do you say to the suggestion that there is  
18 this inherent tension, in your argument, between sort of  
19 distancing from -- from pure independence and the discussion as  
20 between principal and inferior versus in this appropriations  
21 context, where greater independence is more consistent with the  
22 appropriation?

23 MR. PEARCE: I think that is true of both sides in this  
24 matter, and I think that's something -- you just mentioned the  
25 Justice Kavanaugh article. It's something that he points up in

1 his piece on independent counsel and the presidency. It is  
2 inherent in the effort to, on the one hand, ensure that --  
3 whether we call it a independent counsel or a Special  
4 Counsel -- has adequate independence when a situation presents  
5 itself that requires the avoidance of conflict or somebody who  
6 can operate outside of the typical Justice Department, sort of,  
7 operations because it's investigating the Justice Department  
8 itself or it's investigating some sort of high-ranking or  
9 high-level political official.

10 And so wanting to balance that need for independence,  
11 while, at the same time, not shifting so far over into a kind  
12 of independent or Special Counsel that has sort of the kind of  
13 free reign and sort of overly investigating that became the  
14 concern that, I think, led to the lapse in the expiration of  
15 the Independent Counsel Act.

16 Striking the balance between accountability and  
17 independence, as Attorney General Reno said, in promulgating  
18 the 1999 regulations.

19 THE COURT: Okay. Just a quick case law follow-up  
20 from -- from Friday. Are you familiar or aware of any circuit  
21 case law addressing whether a U.S. attorney is a superior or  
22 inferior officer? I know there was a reference to Hilario, and  
23 I think there's another case called Gantt, but I want to make  
24 sure I have a full understanding of the current circuit law on  
25 that question.

1 MR. PEARCE: Sure. And if I can mention one Supreme  
2 Court case as well, which is the 1926 -- the Myers, M-Y-E-R-S,  
3 case.

4 THE COURT: But did that address U.S. attorneys being  
5 inferior?

6 MR. PEARCE: It -- so this is dicta. We don't have to  
7 fight about whether dicta or not. But in dicta, the Court  
8 there says some version of a district attorney, which at the  
9 time was the modern U.S. attorney, is something like a --  
10 clearly an inferior officer. So I think that's relevant to the  
11 Court's question.

12 Beyond that, the cases that the Court just cited,  
13 Hilario from the 1st circuit, Gantt from the 9th Circuit, I  
14 believe, is --

15 THE COURT: One of those concerns an interim U.S.  
16 attorney.

17 MR. PEARCE: Actually, honestly, I think both of them  
18 discuss interims, in part. But I understand part of the  
19 Court's rationale in both of those to decide that a U.S.  
20 attorney is an inferior officer --

21 THE COURT: If they're exercising direction and  
22 supervision, tracking Edmond.

23 MR. PEARCE: I think that's right. I'm pausing only --  
24 yeah. So I think both were decided after -- after Edmond was.  
25 But, yes, I mean, it is certainly, those courts' decisions

1 since 1978, the position of the United States as well, that  
2 United States attorneys are inferior officers.

3 THE COURT: So am I correct that there would be only  
4 one superior officer in the Department of Justice, and that's  
5 the Attorney General?

6 MR. PEARCE: So the -- I -- I think that is the logical  
7 conclusion that -- that flows from our argument. I am not  
8 aware of the -- of the Department having taken a -- a position.  
9 We have taken the position that United States attorneys are  
10 inferior officers. We haven't had to take the position with --  
11 I think the amicus for constitutional lawyers made a  
12 representation to the Court that the Solicitor General is a  
13 principal officer, and that the deputy attorney general is a  
14 principal officer. That -- that is not a position on which the  
15 United States has -- that is not a position the United States  
16 has taken. And I -- and the consistent view from what -- what  
17 I have told the Court is that the principal officer -- the  
18 Attorney General would be the sole principal officer.

19 But I don't think the Court has to reach -- go that far  
20 to -- to -- certainly, to resolve this motion and to deny it.

21 THE COURT: Is there anything question-producing about  
22 that proposition that there would be only one principal officer  
23 in the entire Department of Justice?

24 MR. PEARCE: I don't think that there would be anything  
25 question-producing. I mean, for example, if you take the

1 handful of times that the Constitution has used the term  
2 "principal officer," there is one in the opinions clause that  
3 certainly suggests the president can get one opinion from a  
4 principal officer; that's used twice in the 25th Amendment that  
5 has to do with the incapacity of a president. And it  
6 identifies a meeting of -- I don't have the precise language  
7 here -- but the principal officers of all the executive  
8 branches, which, certainly, Congress has understood as meaning  
9 the cabinet, i.e., the top person in these executive branches.  
10 So --

11 THE COURT: And what to make of the various  
12 statute -- statutes that require, for example, U.S. attorneys  
13 and the Solicitor General to go through the presidential  
14 nomination and Senate confirmation process? What to make of  
15 that statutory Congressional judgment for such high-level  
16 individuals?

17 MR. PEARCE: So I think that that is Congress playing  
18 an oversight role that it is fully statutorily entitled to do.  
19 Certainly, Alexander Hamilton talks about that in the  
20 76 Federalist Papers, saying that that kind of default -- and  
21 that's my second point -- that kind of default process produces  
22 better officers. Congress could certainly be of -- be of the  
23 view that it produces better-quality officers when you have got  
24 somebody who is not only nominated by the president, but  
25 ultimately confirmed by the Senate. But that doesn't transform

1 it into a constitutional requirement; that is statutory.

2 I mean, there are plenty of individuals, as I think the  
3 Court just said, for whom Congress provides for presidential  
4 nomination/Senate confirmation, where the government has long  
5 taken the position they're not U.S. attorneys is the best  
6 example.

7 THE COURT: Assuming U.S. attorneys are not principal  
8 officers --

9 MR. PEARCE: Certainly --

10 THE COURT: -- of course.

11 MR. PEARCE: -- which has, again, been our -- the  
12 government's position since 1978.

13 THE COURT: Okay. There has been some discussion about  
14 deference to Congressional judgments and certainly wouldn't be  
15 a dispositive signal about the status of an officer  
16 constitutionally. But what do you have to say about that, that  
17 at some point, when you see Congress repeatedly subjecting  
18 certain positions to that degree of process, that we would then  
19 reach the inference that someone tantamount to that position  
20 would also, necessarily, have to go through that same  
21 procedure?

22 MR. PEARCE: So again, two responses. One is -- I  
23 think the Court, a few minutes ago, raised the question about  
24 how much weight and analysis, whatnot, to give Congressional  
25 deference or -- or acquiescence. I think --



1           THE COURT: Well, I don't know if I would collapse the  
2     two in that sense. Acquiescence is, essentially, inaction; and  
3     what to make of that. And I'm saying, Congressional judgments  
4     requiring, for example, U.S. attorneys to go through that  
5     formal process, same with SGs.

6           MR. PEARCE: So two responses separate from the one  
7     I -- I just made. One is, that is -- the idea of presidential  
8     appointment or presidential nomination/Senate confirmation is  
9     the default under the Constitution. But that isn't the test  
10    for what makes somebody a principal officer. And so the fact  
11    that Congress has done that, again, leads to better-quality  
12    officers. But even just at a more practical level, I mean,  
13    it's certainly my understanding that there are certain -- so,  
14    officers in the military, where, the way the process works is  
15    that there are lists of names that are just given, and then,  
16    you know, the president says, okay, I nominate all these  
17    people. Congress just says, check. And so it is a -- very  
18    much a pro forma process, which --

19          THE COURT: But there is still a Congressional role,  
20    however -- however quick. There is still Congress taking  
21    advantage of its constitutional responsibility and entitlement  
22    in the Appointments Clause; would you agree?

23          MR. PEARCE: I would certainly agree. And I think  
24    Congress can -- probably, with some constitutional limits,  
25    could probably do that. I don't think Congress could say, for

1 example, a president, him or herself, has to be  
2 presidentially -- it wouldn't make any sense. But certainly,  
3 Congress has its authority to do that.

4 But I just go back to the point that I made before,  
5 that doesn't define -- or the scope of the constitutional  
6 question.

7 THE COURT: Okay. All right. That's all I have.  
8 Thank you, Mr. Pearce.

9 MR. PEARCE: Thank you very much.

10 THE COURT: All right. Mr. Bove.

11 MR. BOVE: Thank you, Judge.

12 There are just a few points that I would like to touch  
13 on in response. The first -- I would like to start with the  
14 text of the appropriation and the -- the language that precedes  
15 it, and in particular, the significance of these two references  
16 to the -- to the Ethics in Government Act, and the -- the  
17 citations to 28 U.S.C.

18 And this is -- I'm not sure if it was an argument that  
19 was presented to Judge Jackson in the District of Columbia, but  
20 it's not one that made -- was analyzed in any meaningful way.  
21 And I do think it's important, as the Court grapples with what  
22 do these terms in the relevant appropriation mean?

23 But the language that precedes it -- and this is clear  
24 from the conference report at 485 and 486 -- referred to money  
25 that had already been spent, and referred to the idea that

1     there was going to be a reimbursement for money that had been  
2     spent pursuant to these continuing resolutions,  
3     while the -- while the DOJ was waiting for the EGA to be -- to  
4     be renewed.

5             And so the significance of that is, that is why, in the  
6     appropriation and that first paragraph, that's not the  
7     operative paragraph, Congress referred to the EGA only and not  
8     to other law. And I don't think that that -- that distinction,  
9     the need to refund money that had already been spent, supports  
10    the argument that there is -- this more restrictive view should  
11    be provided to the -- the operative appropriation language. It  
12    really just gets us back to what -- our main point, which is  
13    that "other law" can't mean what the government is saying that  
14    it means.

15            The -- the second point that I wanted to make, Judge,  
16    is that Your Honor asked a question about -- have there been  
17    situations where one of the sets of regulations has been  
18    rescinded? As a practical matter, is this a real check?

19            And I agree that the answer is no; and that as a  
20    practical matter, the answer is no. And I just wanted to sort  
21    of re-highlight and draw the Court's attention that the one  
22    thing that we have seen DOJ do with respect to these  
23    regulations is that when the GAO was looking at Mr. Fitzgerald,  
24    James Comey went back to the implementing order for Fitzgerald,  
25    and -- and struck the application of the Reno Regulations in

1 order to convince, I submit, the GAO that Mr. Fitzgerald was  
2 sufficiently independent to be able to access the  
3 appropriation.

4 So the one example that's in the record of a time when  
5 somebody acting with the authority of the Attorney General  
6 modified one of these implementing orders, it supports our  
7 position, not -- not harms it.

8 On the issue of remedy, I -- I think that Your Honor  
9 hit this on the head, and I just wanted to -- to point back to  
10 our citation to Judge Jones' concurrence in All American Check  
11 Cashing in the Fifth Circuit, where I think, in a very  
12 persuasive way, she walks through all of the different types of  
13 ways that you can see in the Supreme Court's cases that  
14 separate -- the specifics of a separation of powers problem can  
15 bear on what the appropriate remedy is.

16 And we can see it in our supplemental briefing about  
17 CFPB that there is some language about separation of powers  
18 rejecting an argument that the associations in that case were  
19 making. But what they were making was, I submit, a -- a  
20 different type of argument. They're saying, generally  
21 speaking, there is a problem with this appropriation --  
22 it -- and there is a general separation of powers issue, not  
23 necessarily linked to the enforcement actions that we are  
24 facing, but categorically.

25 We are -- I submit, have a different situation here

1 with a very specific Special Counsel, taking a very specific  
2 set of actions. And we laid out a position on behalf of a  
3 defendant, who is very much aggrieved in these proceedings with  
4 a liberty interest that is imminently threatened in all kinds  
5 of ways, where that type of -- the type of relief we are  
6 seeking, dismissal, is appropriate based on what Judge Jones  
7 said and the -- and the authorities she laid out, and that the  
8 Supreme Court, as Your Honor noted, didn't really have -- have  
9 occasion to address in CFPB.

10 Another point on this topic of remedy. I provided to  
11 Your Honor a citation to an Eastern District of California  
12 case, where, following McIntosh, the defendants in McIntosh  
13 went back to the district court. And the government -- the  
14 Department of Justice -- voluntarily dismissed the charges  
15 because, based on the reasoning of McIntosh, there wasn't  
16 funding for the prosecution. And the language of the -- the  
17 Rule 48 filing that's on the docket there, in substance, says:  
18 We can't meet our evidentiary burden of establishing that we  
19 should be able to access the appropriated funds for purposes of  
20 this prosecution.

21 I already said all that. But my point is, Judge, we're  
22 at this two-day hearing talking about whether and to what  
23 extent Special Counsel's Office is acting in a way that is  
24 consistent with and bound by DOJ practices? Did they talk to  
25 them? Did they find -- did they find out why in the Eastern

1 District of California based on the reasoning in McIntosh, the  
2 government -- the prosecutors, you know, in place under the  
3 supervision of a U.S. attorney, decided to dismiss a case,  
4 understanding fully, I submit, that if they hadn't chosen that  
5 course, the Court would have done that for them? And instead,  
6 based on that record in -- and literally, no representations to  
7 Your Honor about the degree of oversight and whether things are  
8 consistent with practices, just come in here and say dismissal  
9 is not appropriate. I mean, this has happened, and it should  
10 happen here.

11 This issue of the alternative sources of funding, I  
12 just -- it's -- it's difficult for me to imagine how that is a  
13 basis to resolve this motion, and I think what it really does  
14 is highlight the separation of powers issues that we're talking  
15 about. Because the Special Counsel's Office should not be able  
16 to say, hypothetically, there are other appropriations that we  
17 may be able to access; so, Your Honor, you shouldn't look  
18 carefully at whether this permanent indefinite appropriation  
19 with no cap, as Your Honor has observed, should apply here.

20 Because I submit, that if -- if Your Honor made a  
21 ruling that -- that for the -- either or both of the two  
22 reasons we've identified, that appropriation should not be  
23 accessible to this Special Counsel -- and I think we have given  
24 the Court all kinds of reasons that that is true. And I think  
25 the Special Counsel's Office has provided legal argument but no

1 factual basis in the record to -- to really contest us -- I  
2 think there would be a very strong political response to  
3 actions by the Department of Justice, to say, actually, no,  
4 we're going to take a mulligan on the permanent indefinite  
5 appropriation, and we're going to take a look at another.

6 I think Congress would have a response. And certainly,  
7 we might have another motion. Not just President Trump. We  
8 have co-defendants here. And so we would react to that  
9 differently as well. So that hypothetical, I think, only  
10 highlights that this is a process governed by the  
11 Appropriations Clause that requires -- that should require --  
12 that contemplates real interaction between Congress looking at  
13 these things and prosecutors carrying out their duties. And --  
14 and what we have going on here is not that.

15 And, lastly, Your Honor's touched, with both sides,  
16 on there is some inherent tension in this idea of what  
17 independence means on Friday and what it means today. Well,  
18 here is what I think it really means to us. Our position is  
19 that more oversight from Congress is required for the  
20 extraordinary things that are going on in these -- these  
21 prosecutions. Extraordinary and unprecedented. And whether  
22 that is more oversight on the front end, as contemplated for  
23 principal officers, or at this point, based on a real  
24 appropriations process, where current Congressmen are looking  
25 at what is actually going on. That's our position. More is

1 required here, given what is at -- at stake.

2 The government's position, in contrast, is that much,  
3 much less is required, that not much at all is required. And  
4 that is, I think, disrespectful and an unacceptable way to the  
5 separation of powers issues that we're talking about.

6 And I -- you know, one -- one way to really highlight  
7 this, Judge, is we're going to come back this afternoon to talk  
8 about -- just speaking for President Trump -- what is a truly  
9 extraordinary effort -- extraordinary -- to gag his ability to  
10 speak, including at -- at a debate, on the campaign trail?

11 Who -- who authorized that, Judge? Who authorized --  
12 did the Attorney General authorize that motion o be filed? Is  
13 that what you were told on Friday in vague terms but without  
14 specifics? And I think it really brings to the head -- to a  
15 head exactly what we're dealing with here and why at each and  
16 every juncture in this case, we will push for that oversight  
17 and try and illustrate ways that it is really falling apart.

18 THE COURT: All right. Thank you. That will conclude  
19 our arguments this morning on the motion to dismiss. We will  
20 resume at 3:00 p.m. to address the other bond modification  
21 motion.

22 I wish you all a pleasant lunch, and we will see each  
23 other at 3:00. Thank you.

24 (These proceedings concluded at 11:42 a.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate  
transcription of the proceedings in the above-entitled matter.

<u>DATE:</u> 06-24-2024	/s/Laura Melton
	LAURA E. MELTON, RMR, CRR, FPR
	Official Court Reporter
	United States District Court
	Southern District of Florida
	Fort Pierce, Florida

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